128274

Order 2001-5-1
Served: May 3, 2001

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 3rd day of May, 2001

Joint Application of

CONTINENTAL AIRLINES, INC.

and

COMPAÑÍA PANAMEÑA DE AVIACIÓN, S.A.

under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for an Alliance Agreement

Docket OST-2000-8577 - 13

ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY FOR AN ALLIANCE AGREEMENT

By this order, we grant approval of and antitrust immunity for an Alliance Agreement between Continental Airlines, Inc. (Continental) and Compañía Panameña de Aviación (COPA) pursuant to 49 U.S.C. §§ 41308 and 41309, subject to the conditions described below.[1]

In May 1997, the Governments of the United States and Panama reached agreement on an open-skies aviation relationship that promised substantial benefits to consumers and communities in both countries. One predicate for our approval and grant of antitrust immunity for this Alliance Agreement is the existence of the open-skies aviation agreement. The agreement allows U.S. airlines to serve any point in Panama (and open intermediate and beyond rights) from any point in the United States and allows Panamanian airlines to do the same. Our evaluation indicates that open-skies initiatives encourage more competitive service, since market forces determine the price and quality of airline service, not restrictive government regulation.

I. The Alliance Agreement

The essential elements of the Alliance Agreement include coordination of flight schedules, route networks, and route planning; the establishment of joint marketing, advertising and distribution

---

[1] On January 12, 2001, the Department placed in the docket a redacted version of the partners' Alliance Agreement dated May 22, 1998. Consistent with Order 2001-2-5, on February 9, the Joint Applicants submitted the unredacted portions of the Alliance Agreement in the docket, concurrently with a Joint Motion for confidential treatment of this material.

networks; code-sharing; the harmonization of existing internal information systems, including pricing, inventory, yield management, reservations, ticketing, accounting, maintenance, financial reporting, and distribution; revenue sharing; coordination of their physical operations; and coordination of their frequent flyer programs. In summary, the Alliance Agreement would allow the Joint Applicants to operate essentially as a single company, while retaining their individual identities regarding ownership and control.[2]

II. The Joint Application and Responses

A. The Application

On December 22, 2000, the Joint Applicants filed an application seeking approval of and antitrust immunity for their Alliance Agreement, subject to a five-year review.[3] They state that the proposed alliance is fully consistent with the U.S.-Panama open-skies agreement, U.S. international aviation policy, and that it will increase competition in the U.S.-Latin America market at the key Miami gateway. They state that the proposed alliance will improve consumer convenience and choice, improve operating efficiencies that will create greater service value for passengers and shippers, increase competition in various markets, and generate economic benefits for communities across the route networks of both airlines.

They state that the objective of the Alliance Agreement is to enable them to plan and coordinate service over their respective route networks as if they were a single entity. They also claim that although the U.S.-Panama open-skies agreement allows them to serve the code-share routes individually they cannot do so since neither airline individually has the resources to provide the proposed alliance flights throughout the Western Hemisphere alone.

The Joint Applicants state that the U.S.-Panama agreement was a milestone for open skies between the U.S. and Latin America, and that immunizing the proposed "end-to-end" Continental-COPA alliance will encourage the fulfillment of the U.S. foreign policy objectives underlying the U.S.-Panama agreement. The Joint Applicants maintain that Department precedent also warrants their request. They state that their application is fully consistent with the U.S. Government's commitment to open-entry markets and free and fair international competition.

The Joint Applicants state that their request meets the Department's standards for grant of antitrust immunity. For example, they assert that the proposed agreement will enable them to attain the synergies available from linking their route networks end-to-end, increase the availability of seamless, on-line service through enhanced network-to-network combinations, achieve economies

---

[2] Corporación de Inversiones Aéreas, S.A. owns 51 percent and Continental owns 49 percent of COPA Holdings, S.A., which owns 100 percent of COPA. Joint Application at 22-23.

[3] By Order 98-5-26, issued May 20, 1998, the Department approved a code-share arrangement between American Airlines and the TACA Group, which at that time included COPA. On February 17, 2000, COPA withdrew from affiliation with the TACA Group. See Docket OST-2000-7088 (Alliance Agreement, Amendment No. 2, Exhibit JA-1).

of scale, reduce costs and increase competition. The Joint Applicants state that these benefits will enable them to serve the city pairs of their alliance network more efficiently and to compete more effectively with the American Airlines-LAN Chile immunized alliance, and the American Airlines-TACA Group and United Air Lines-Varig code-share alliances, and other aviation partnerships in the U.S.-Central America/Latin America/Caribbean markets.

The Joint Applicants state that they are unwilling to implement the proposed alliance without the Department's grant of immunity. They assert that without immunization they cannot be assured that their proposed merger-like activities would not be challenged on antitrust grounds. They state that they will not expose themselves to the risks and potential costs associated with antitrust litigation to implement their alliance.[4]

The Joint Applicants maintain that the proposed alliance will have no adverse competitive effects. While noting that Continental has recently expanded service in the U.S.-Central America market, Continental states that it offers only 22 percent of the total U.S.-Central America seats. Continental further asserts that only through an immunized alliance with its partner COPA will it be able to compete more effectively in Latin America with American Airlines, Delta Air Lines and United Air Lines and their respective partners.

The Joint Applicants state that Continental's operations throughout the United States and COPA's operations throughout Central America and much of Latin America will provide a high level of synergy in their respective networks. They maintain that if their proposed alliance is immunized it will add new competition for American Airlines' network of alliances on routes in the Latin America region. The partners argue that individually they cannot compete effectively on U.S.-Central America routes against the American-TACA Group-Iberia network. However, the Joint Applicants state that together they expect to compete with American and its partners, thus enhancing competition on U.S.-Latin America routes and providing the high level of consumer choice advanced by the U.S.-Panama open-skies agreement.

At Miami, Continental argues that it will gain more effective access to COPA's Latin America gateway and allow it to compete head-to-head against American's Latin America hub operations. The Joint Applicants state their proposed closer cooperation will enable them to increase their service in the Miami-Central America market and at their other U.S. gateways.

Finally, the Joint Applicants state that they are prepared to voluntarily withdraw from participation in any International Air Transport Association (IATA) traffic coordination activities that discuss any proposed through fares, rates or charges applicable between the U.S. and Panama, and between the U.S. and any other countries designating an airline that has been or is subsequently granted antitrust immunity for participation in similar alliance activities with a U.S. airline [5]

The application is unopposed.

---

[4] Application at 11-12.

[5] Application at 21-22.

B. Responses

On January 12 and March 2, 2001, American Airlines and the TACA Group filed joint answers. While not objecting to the application, they urge the Department to process their joint application for antitrust immunity and the Continental-COPA application on a "parallel track."[6] They argue that both applications are fully consistent with the Department's pro-competitive policies, and with the public interest. They maintain that the Department should promptly approve both applications in order to enhance service and to reduce fares in the U.S.-Central America market.

On January 22, 2001, the City of Houston and the Greater Houston Partnership filed a motion for leave to file and a reply supporting the request.[7] Houston states that in its view the proposed alliance will enhance competition in the U.S.-Latin America market and improve air service links between Houston and Panama City and expand the traveling and shipping options available to the U.S. public.

On January 24 and March 13, 2001, the Joint Applicants filed replies.[8] Noting that their application is complete, non-controversial and unopposed, they urge the Department to approve their joint request.

III. Decision Summary

Continental and COPA have applied for approval of and antitrust immunity for an Alliance Agreement under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners. We find that the Alliance Agreement should be approved and granted antitrust immunity, to the extent provided below.[9] Our examination of their proposal leads us to find that the proposed alliance will enhance competition overall and allow the airlines to provide better service and enable them to operate more efficiently. We also find that it is unlikely that the Alliance Agreement — subject to the conditions included here — will substantially reduce competition in any relevant market. Finally, our actions here will allow the Joint Applicants to maximize fully the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw resulting from the fundamental liberalization of air services under the U.S.-Panama open-skies accord.

---

6 On March 17, 2000, American Airlines and the TACA Group filed an application for approval of and antitrust immunity for an alliance agreement. Docket OST-2000-7088.

7 We will grant the motion.

8 On January 24 they also filed a motion for leave to file. We will grant the motion.

9 While American Airlines and the TACA Group urge the Department to process concurrently their application and the instant application, we do not find that delaying action in this matter benefits the public interest. This case is ripe for action; the American Airlines-TACA Group case is not. Specifically, by Notice dated April 27, 2001, we directed interested parties in the American Airlines-TACA Group case to file answers no later than May 18, 2001, and replies no later than May 30, 2001.

In addition, we will require the Joint Applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and Panama, as well as between the United States and the homeland(s) of foreign airlines participating with U.S. airlines in other immunized alliances; (2) to file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for review their Alliance Agreement within five years of issuance of this Order. We also find it in the public interest to direct COPA to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by U.S. airlines and its partner Continental).

We find that our action in this matter will advance important public benefits, and is consistent with our policy of facilitating competition among emerging multinational airline networks. We fully recognize the trend toward expanding international airline networks as a response to the underlying network economics of the airline industry.

Finally, we have determined that it is appropriate and consistent with the public interest to issue a final decision in this case. Interested parties have had full opportunity to comment on these matters. The application is unopposed. We also have determined that the proposed alliance presents no substantial competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a final order approving this unopposed application.

IV. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[10] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious

---

[10] Section 41309(b).

transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.[11] The public benefits include international comity and foreign policy considerations.[12]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[13] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[14]

V. Approval of the Agreement

The U.S.-Panama market is governed by an open-skies agreement that eliminates barriers to new entry, expansion and competition created by government regulation in this market. The open-skies agreement recognizes the value of airline networks and provides the opportunity for competing airlines and alliances to offer the services afforded by this liberalized regime.

The Department has examined and found substantial consumer and competitive benefits ensuing from open-skies agreements and from the structural changes that have occurred in the global airline system, such as alliances.[15] The purpose of the application now before us is to allow the partners to broaden and deepen their code-share alliance to achieve greater operational efficiencies and to continue the expansion of their route networks on a more integrated and coordinated basis.

Continental operates daily nonstop flights in the Houston-Panama City and Newark-Panama City markets; and it code shares on flights operated by its partner COPA in the Los Angeles/ Orlando/Miami/San Juan-Panama City markets. COPA operates daily nonstop flights in the Los Angeles-Panama City market; two daily nonstop flights in the Miami-Panama City and San Juan-Panama City markets; and nonstop service three times per week in the Orlando-Panama City market; and it code shares on flights operated by its partner Continental in the Newark/Houston-Panama City markets.

American Airlines operates three daily nonstop flights in the Miami-Panama City market; Iberia operates daily nonstop flights in the Miami-Panama City market; and Delta Air Lines operates daily nonstop flights in the Atlanta-Panama City market.

---

11 Section 41309(b)(1)(A) and (B).

12 Section 41309(b)(1)(A).

13 Section 41309(c)(2).

14 *Id.*

15 See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999; and *International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect* (Second Report), U.S. Department of Transportation, Office of the Secretary, October 2000.

We find that the proposed alliance would provide important public benefits. We agree with the Joint Applicants' contention that the proposed arrangement is pro-competitive and pro-consumer, and will offer the traveling public a greater choice of destinations and competitive routings. We also find that it is unlikely that the Alliance Agreement as conditioned would substantially reduce or eliminate competition in any relevant market.

A. Antitrust Issues

The Joint Applicants state that the Alliance Agreement will allow them to develop mechanisms to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreement's intended commercial and business effects are equivalent to those resulting from a merger. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[16]

The Clayton Act test requires the Department to consider whether the Alliance Agreement will substantially reduce competition by eliminating actual or potential competition between Continental and COPA so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.[17] To determine whether a transaction is likely to violate the Clayton Act, the Department considers whether it is likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels or reduce product and service quality below competitive levels for a significant period of time. To determine whether a transaction is likely to create or enhance market power, the Department primarily considers whether the transaction would substantially increase concentration in the relevant markets, a proposed transaction's potential for harm with any loss of competition between the partners, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed transaction's potential for harm.

The markets requiring a competitive analysis are: first, the U.S.-Central America market; second, the U.S.-Panama market; and third, the city-pair markets.

1. The U.S.-Central America Market and the U.S.-Panama Market[18]

We find that the Alliance Agreement should not diminish competition in the U.S.-Central America market. In terms of passengers transported, Continental's nonstop passenger market share was about 18 percent. The proposed alliance (including COPA, at 0.7 percent) would have a nonstop passenger market share of 18.7 percent. In contrast, American Airlines and its regional partners (TACA International-LACSA-Aviateca-NICA) had a nonstop passenger market share of about

---

16 Order 92-11-27, at 13.

17 *Id.*

18 Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended June 2000.

29.4 percent; Mexicana had a nonstop passenger market share of about 15 percent; and Aeromexico had a nonstop passenger market share of about 11.7 percent. Additionally, the nonstop passenger market shares for Alaska Airlines was 5.7 percent; for Delta Air Lines, 5.1 percent; for United and its immunized partner Lufthansa, 3.4 percent; for America West, 2 percent; for Iberia Air Lines, 1.8 percent; for Aero California, 1.7 percent; and for Northwest, 1.2 percent.

We therefore find that the U.S.-Central America market is competitive in terms of service. We also find that the alliance, if immunized, would not substantially reduce this competition.

In the U.S.-Panama market, American Airlines is the major scheduled airline. American's nonstop passenger market share was about 35 percent. In addition, American and its Oneworld alliance partner, Iberia (about 7 percent), together have 42 percent of the market. In contrast, Continental's nonstop passenger market share was about 24 percent. The proposed alliance (including COPA, at about 17 percent) would have a nonstop passenger market share of about 41 percent. Delta Air Lines had a nonstop passenger market share of about 10 percent. Additionally, the nonstop passenger market shares for EVA Airways was about 3.5 percent; for Aero Lloyd, about 1.9 percent; and for Aero Continental, about 1.4 percent.

We therefore find that the Alliance Agreement would not eliminate or substantially reduce competition in the U.S.-Panama market. As we noted above, because of the Open-Skies agreement, any U.S. airline may serve Panama from any point in the United States. Furthermore, the record of this case does not show any significant operational barriers to entry in the U.S.-Panama market (*i.e.*, access to slots or airport facilities) or marketing barriers that would prevent entry.

2. The City-Pair Markets

We have reached the same conclusion with respect to the city-pair markets at issue here. The record shows that the two airlines do not compete on a nonstop basis in any U.S.-Panama city-pair market. Continental offers nonstop service in the Newark/Houston-Panama City markets; and COPA offers nonstop service in the Los Angeles/Orlando/Miami/San Juan-Panama City markets. We find that the alliance therefore will not eliminate or substantially reduce competition in any city-pair.[19]

---

[19] The partners state that they offer competing nonstop flights between Panama City and Guayaquil, Ecuador; and that Continental offers nonstop and COPA offers one-stop service between Panama City and Quito, Ecuador. While factual, our evaluation of this case finds that the proposed alliance will not substantially eliminate or reduce competition in any relevant U.S.-Latin America market. Specifically, our review of the U.S.-Ecuador market shows that the American Airlines-LAN Chile immunized alliance offers daily nonstop service in the Miami-Guayaquil/Quito markets; and nonstop service four times a week in the New York-Guayaquil market. Therefore, we find that the American-LAN Chile operations will provide competitive discipline for the Continental-COPA services in the U.S.-Ecuador market.

For these reasons, we find that the arrangement will benefit overall competition in the affected markets. The proposed alliance will enable the partners to operate more efficiently and to provide the public with enhanced service options. The integration of the partners' services will provide pro-competitive advantages that outweigh any possible negative effects on competition in these city-pair markets.

B. Public Interest Issues

Under Section 41309, we must determine whether the Alliance Agreement would be adverse to the public interest. Section 41308 requires a similar public interest examination. We find that approval of the Alliance Agreement will promote the public interest.

Open-Skies agreements with foreign countries give any authorized airline from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if the authorized airline so wishes. These agreements place no limits on the number of flights that airlines can operate, and airlines can charge any fare unless both countries disapprove it.[20]

We have previously determined that an important pro-competitive effect of global alliances is particularly evident in the case of the behind- and beyond-markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining.[21] Integrated alliances can offer a multitude of new on-line services, on a global basis. In this case, we note that Continental's global network provides consumers with service to more than 200 destinations in more than 50 countries on 5 continents, and that COPA provides air service to 31 destinations in 20 countries in North, Central, and South America, as well as the Caribbean. The extensive networks of the partners, especially within the Western Hemisphere, further support our view that the proposed alliance will benefit consumers by increasing international access to more foreign destinations with new and improved routing options, particularly for traffic to or from cities behind major gateways. Our recent evaluation of international alliances shows that they stimulate traffic in markets served with connecting services and thereby increase competition and service options in the overall international market and increase opportunities for the traveling public and the aviation industry.[22] The proposed alliance would also allow the partners to improve the efficiency of their operations and to otherwise work together to improve service not only in the U.S.-Panama market, but also in the U.S.-Latin America market.

For these reasons, we have found that approving the Alliance Agreement will benefit the traveling public, taking into account the conditions imposed by the Department, and is unlikely to reduce competition substantially in any relevant markets, and is otherwise in the public interest.

---

20 Order 92-8-13, August 5, 1992.

21 See Order 96-5-12 at 17-18.

22 See fn. 15, above.

VI. Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that the public interest requires immunity. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record indicates that the Joint Applicants will not proceed with the Alliance Agreement without antitrust immunity.[23] The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They maintain that the proposed integration of their operations would surely expose them to antitrust litigation, since they intend to establish a common financial objective. Additionally, they indicate that full operational integration will necessarily mean that they will coordinate all of their business activities, including coordinated schedules, revenue sharing, pricing and yield management, joint marketing programs, and information sharing.

Since the antitrust laws allow competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services violates the antitrust laws. Nevertheless, the record indicates that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant immunity. The record also persuades us that they will not proceed without it.

To the extent discussed above, we find that we should grant antitrust immunity to the Alliance Agreement. We also intend to review and monitor the Joint Applicants' progress in implementing the Alliance Agreement in order to ensure that the partners are carrying out the arrangement's pro-competitive aims. We will also require them to resubmit their Alliance Agreement for review in five years.

While concluding that we should approve and give immunity to the Alliance Agreement, we find, as discussed next, that certain conditions are necessary to allow us to find that our actions in these matters are in the public interest.

---

[23] Application at 11-12.

VII. IATA Tariff Coordination Issue

Consistent with our decision in Order 99-9-9 (*American Airlines and LAN Chile antitrust immunity case*), it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore have decided to condition our approval and grant of antitrust immunity in this case by requiring Continental and COPA to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Panama, or between the United States and any other countries designating an airline that has been or is subsequently granted antitrust immunity by the Department for participation in similar alliances with a U.S. airline.[24] Under this condition, the alliance partners may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Panama, and between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.[25]

We find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities between the Joint Applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed activities is the potential for increased price competition between the partners and other airlines, particularly other international alliances. We have found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Joint Applicants to continue tariff coordination within IATA undermines such competition.

---

[24] This condition currently applies to prices between the United States and the Netherlands; between the United States and Italy (see Order 99-12-5 at 3); between the United States and Germany, Denmark, Norway, Sweden, and Austria (see Order 96-5-27 at 17, Order 96-11-1 at 23, and Order 2001-1-19 at 16); between the United States and Chile (see Order 99-9-9 at 21); between the United States and Belgium and Switzerland (see Order 2000-5-13 at 3-4); between the United States and Malaysia (see Order 2000-10-12 at 14); between the United States and Iceland (see Order 2000-10-13 at 16); and between the United States and New Zealand (see Order 2001-4-2 at 2-3). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (Dockets OST-96-1116 and OST-95-618).

[25] Under this condition, the partners could discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

VIII. O&D Survey Data Reporting Requirement[26]

We have access to market data where U.S. carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for certain large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. Consistent with determinations in similar cases,[27] we have decided to require COPA to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by its partner Continental).[28]

We have decided to grant confidentiality to the COPA O&D Survey reports and special reports on code-share passengers. Currently, we grant confidential treatment to international O&D Survey data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct COPA to provide certain limited Origin-Destination data to the O&D Survey, COPA is not air carrier within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." COPA accordingly will have no access to the data filed by U.S. air carriers.

---

[26] We will provide confidentiality protection for these data, as we do for international O&D data submitted by U.S. airlines. Although we will use these data for internal monitoring purposes, we will not disclose it to any other airlines.

[27] For example, see Order 96-6-33 at 21.

[28] Consistent with our determinations in Orders 99-9-9, 2000-10-12, and 2001-4-2, we intend to request other foreign carrier members of immunized international alliances to submit O&D Survey data and condition any further grants of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow COPA or other foreign carriers any access to U.S. carrier O&D Survey data.

Moreover, we will be making COPA's submissions confidential while maintaining the current restriction on access to U.S. air carrier O&D Survey data by foreign air carriers.

IX. Computer Reservations System (CRS) Issues

We have decided to grant the Joint Applicants request for antitrust immunity to coordinate their CRS and internal reservations system. Our evaluation of this request indicates that neither Continental nor COPA has an ownership interest in any CRS system. Accordingly, we find that there is no need to impose conditions or otherwise limit immunity with respect to Continental-COPA CRS operations.

X. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreement could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft.[29]

XI. Summary

We grant approval and antitrust immunity to the Alliance Agreement. We also direct the Joint Applicants to resubmit the Alliance Agreement within five years of the issuance of this Order. However, the Department is not authorizing Continental-COPA to operate under a common name. If they decide to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from all IATA tariff conference activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and Panama, or between the United States and any other countries designating an airline that has been or is subsequently granted antitrust immunity by the Department for participation in similar alliances; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval.[30] We also direct COPA to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by its partner Continental).

---

[29] See 14 C.F.R. 399.88.

[30] Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct Continental and COPA to provide the Department with all contractual instruments that may materially alter, modify, or amend the Alliance Agreement.

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Alliance Agreement between Continental Airlines, Inc. and Compañía Panameña de Aviación insofar as it relates to foreign air transportation;

2. We direct Continental Airlines, Inc. and Compañía Panameña de Aviación to resubmit their Alliance Agreement for review five years from the date of issuance of this Order;

3. We condition our grant of approval and immunity to require Continental Airlines, Inc. and Compañía Panameña de Aviación to withdraw from participation in any International Air Transport Association tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Panama, and/or between the United States and any other countries whose designated airlines participate in similar agreements that either have been or are subsequently granted antitrust immunity by the Department;

4. We direct Compañía Panameña de Aviación to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner Continental Airlines, Inc.). The full itinerary record is defined as the passenger's complete itinerary from origin to destination as opposed to the abbreviated gateway record reported under T100(f);

5. We direct Continental Airlines, Inc. and Compañía Panameña de Aviación to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use "common brands";

6. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3 to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as heretofore described;

7. We direct Continental Airlines, Inc. and Compañía Panameña de Aviación to submit any subsequent subsidiary agreements implementing the Alliance Agreement for prior approval;[31]

8. We defer action on the motions filed by Continental Airlines, Inc. and Compañía Panameña de Aviación for confidential treatment of certain data and information;

9. This order is effective immediately;

10. We may amend, modify, or revoke this authority at any time without hearing;

---

[31] See fn. 30, above.

11. We grant all motions for leave to file otherwise unauthorized documents; and

12. We shall serve this order on all persons on the service list in this docket.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for Aviation
And International Affairs

(SEAL)